Supreme Court, U. S.
FILED
APR 6 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. ~~78~~ 78-1531

GAYLE M. FRANZEN, et al.,

Petitioners-Appellants,

vs.

UNITED STATES OF AMERICA ex rel. EDDIE ALLEN,

Respondent-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
DONALD B. MACKAY,
MELBOURNE A. NOEL, JR.,
WILLIAM M. WIPPOLD,
Assistant Attorneys General,
188 West Randolph Street,
Chicago, Illinois 60601,

Attorneys for Petitioners.

MICHAEL M. MIHM,
State's Attorney,
Peoria County, Illinois,

Of Counsel.

Printed by Authority of the State of Illinois — 365

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	4
Reasons For Granting The Writ	9
I. The Seventh Circuit Court Of Appeals Has Unreasonably Extended The Constitutional Holding Of *Doyle* v. *Ohio*	9
A. The Seventh Circuit Court Of Appeals Has Expanded The Strictures Of *Doyle* To Preclude Prosecution Use Of A Defendant's Volunteered Pre-Arrest, Pre-*Miranda* Warning Statements	9
B. The Seventh Circuit Court Of Appeals Unreasonably Expanded The Concept Of What Constitutes A Comment On Silence	12
II. There Exists Between The Circuits And Between Federal And State Courts A Conflict In Rationale Regarding Impeachment By Silence, Thus Causing Confusion Among The Lower Courts	14
III. The Seventh Circuit Court Of Appeals Should Have Addressed The Question Of Retroactive Application Of *Doyle* And Should Have Held It To Be Applied Prospectively Only	17

PAGE

IV. The Seventh Circuit Court Of Appeals Erred When It Held That Certain Questions Asked On Cross-Examination Did Not Constitute Harmless Error 20

Conclusion 28

Appendix A1

CITATIONS

CASES PAGE

Bailey v. *Holley,* 530 F. 2d 169 (7th Cir. 1976) 18

Carroll v. *Krause,* 295 Ill. App. 552, 15 N.E. 2d 323 (1938) 13

Chapman v. *California,* 386 U.S. 18 (1967) 21

Chapman v. *United States,* 547 F. 2d 1240 (5th Cir. 1977), *cert. den.,* 431 U.S. 908 (1977) 21, 23, 25

Connelly v. *DeChristoforo,* 416 U.S. 637 (1968) 21

Doyle v. *Ohio,* 426 U.S. 610 (1976).....
.....4, 8, 9, 11, 14, 15, 16, 17, 18, 19, 20, 22

Escobedo v. *Illinois,* 378 U.S. 478 (1964) 18

Griffin v. *California,* 380 U.S. 609 (1965) 19, 20

Halliday v. *United States,* 394 U.S. 831 (1968) 19

Harrington v. *California,* 395 U.S. 250 (1969) 24

Harris v. *New York,* 401 U.S. 222 (1971) 10

Johnson v. *New Jersey,* 384 U.S. 719 (1966) 18

Leake v. *Cox,* 432 F. 2d 982 (4th Cir. 1970) 23

Leon v. *Kuhlman,* 443 F. Supp. 50 (S.D. N.Y. 1977) ..9, 16

Linkletter v. *Walker,* 381 U.S. 718 (1965) 18

Mapp v. *Ohio,* 367 U.S. 643 (1961) 18, 20

Miranda v. *Arizona,* 384 U.S. 436 (1966) 10, 12, 18

Morgan v. *Hall,* 569 F. 2d 1161 (1st Cir. 1978) 23, 24

Oregon v. *Haas,* 420 U.S. 714 (1975) 10

People v. *Allen,* 37 Ill. App. 3d 619, 346 N.E. 2d 486 (1976), *cert. den.,* 97 S. Ct. 1603 (1977) 4, 13

People v. *Beller,* No. 50334 (Slip. Op. Nov. 1978) 15

People v. *Green,* No. 50240 (Slip. Op. Nov. 1978) 15

People v. *Henry,* 47 Ill. 2d 312, 265 N.E. 2d 876 (1970) 12

Cases	Page
People v. *Rehbein,* No. 50216 (Slip. Op. Sept. 1978)	17
Raffel v. *United States,* 271 U.S. 494 (1925)	10
Reid v. *Riddle,* 550 F. 2d 1003 (4th Cir. 1977)	23
Schneble v. *Florida,* 405 U.S. 427 (1972)	22, 24
Shadd v. *United States,* 423 F. Supp. 511 (W.D. Pa. 1976)	9
Stone v. *Estelle,* 556 F. 2d 1242 (5th Cir. 1977)	24
Tehan v. *United States,* 382 U.S. 506 (1966)	19, 20
Twyman v. *Oklahoma,* 560 F. 2d 422 (10th Cir. 1977)	13, 14, 16
United States v. *Agee,* 440 F. Supp. 614 (E.D. Pa. 1977)	16
United States v. *Brown,* 548 F. 2d 1194 (5th Cir. 1977)	9
United States v. *Conlin,* 551 F. 2d 534 (2nd Cir. 1977)	16
United States v. *Davis,* 546 F. 2d 583 (5th Cir. 1977), *cert. den.,* 431 U.S. 906 (1977)	23
United States v. *Davis,* 546 F. 2d 617 (5th Cir. 1977)	14, 16
United States v. *Earl,* 529 F. 2d 1145 (6th Cir. 1976)	23
United States v. *Garafolo,* 385 F. 2d 200 (7th Cir. (1967), vacated on other grounds, 390 U.S. 144 (1968), on remand, 396 F. 2d 952 (7th Cir. 1968)	22
United States v. *Hale,* 422 U.S. 171 (1975)	8, 10, 13, 16, 17, 22
United States v. *Henderson,* 565 F. 2d 900 (5th Cir. 1978)	9, 16
United States v. *Impson,* 531 F. 2d 274 (5th Cir. 1976)	10
United States v. *Kopel,* 552 F. 2d 1265 (7th Cir. 1977)	14
United States v. *Mireles,* 570 F. 2d 1287 (5th Cir. 1978)	14, 16

Cases	Page
United States v. *Mitchell,* 558 F. 2d 1332 (8th Cir. 1977)	16
United States v. *Reed,* 392 F. 2d 865 (7th Cir. 1968), *cert. den.,* 393 U.S. 984 (1968)	21
United States v. *Riggs,* 537 F. 2d 1219 (4th Cir. 1976)	17
United States v. *Wycoff,* 545 F. 2d 679 (9th Cir. 1976), *cert. den.,* 429 U.S. 1105 (1977)	23
Walder v. *United States,* 347 U.S. 62 (1954)	11
Williams v. *United States,* 401 U.S. 646 (1971)	18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. ——

GAYLE M. FRANZEN, et al.,

Petitioners-Appellants,

vs.

UNITED STATES OF AMERICA ex rel.
EDDIE ALLEN,

Respondent-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO: THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioner, Gayle M. Franzen, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, which affirmed the decision of the United States District Court for the Southern District of Illinois, Northern Division, ordering the issuance of a Writ of Habeas Corpus.

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals, as to which review is sought, has not been published at this time. It is attached to this Petition as Appendix A .

The Decision and Order of the District Court, granting a writ of habeas corpus has not yet been published. It is incorporated into the opinion of the Court of Appeals which is attached as Appendix A .

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit affirming the Decision and Order of the District Court was filed January 8, 1979. No petition for rehearing has been filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the proscription against impeachment by silence as expressed in *Doyle* v. *Ohio,* 426 U.S. 610 (1976), applies to pre-arrest as well as post-arrest silences.

2. Whether impeachment of a defendant by a statement not literally inconsistent with testimony at trial is a comment upon silence in violation of the due process standards of *Doyle* v. *Ohio.*

3. Whether *Doyle* v. *Ohio* should be applied retroactively to a case tried more than two years before the *Doyle* decision.

4. Whether the court below erred in concluding that any trial errors were not harmless beyond a reasonable doubt.

STATEMENT OF THE CASE

This case revolves around certain questions by the prosecution during cross-examination and statements made during closing argument at respondent's trial for murder. Respondent alleges that those questions and comments violated his Fifth and Fourteenth Amendment rights, as delineated in *Doyle* v. *Ohio,* 426 U.S. 610 (1976), because they constituted an impermissible use of his pre-trial silence for impeachment purposes.

Respondent was convicted of murder and sentenced on June 21, 1974, to a term of 18 to 50 years. That conviction was affirmed by the Appellate Court of Illinois in *People* v. *Allen,* 37 Ill. App. 3d 619, 346 N.E. 2d 486 (1976). Leave to Appeal to the Illinois Supreme Court was denied, and this Court denied respondent's petition for *certiorari* at 97 S. Ct. 1603 (1977). Respondent then sought a writ of habeas corpus from the United States District Court, alleging the same ground as he had alleged on appeal. The writ was granted, on July 24, 1978, and that decision was affirmed by the Court of Appeals on January 8, 1979. It is from the order granting a writ of habeas corpus that petitioner now seeks *certiorari.*

Factually, it is undisputed that the respondent, Eddie Allen, shot and killed his wife on January 3, 1974, at the home of Margaret and Daniel Moore where Mrs. Allen was living, having separated from her husband. At trial Mrs. Moore testified that Allen had arrived at her house and she left the room so Mr. and Mrs. Allen could talk. Mrs. Moore then heard Mrs. Allen run down the hall to the back door screaming that Allen had a gun. Allen caught his wife at the back door, at which point Mrs. Moore heard a sound like a blow or a crash. Mrs. Moore went to the back door

and noticed that Mrs. Allen was bleeding from the back of her head.

Allen testified that while Mrs. Moore was out of the living room he had told his wife he knew of her discussions with two men about having him killed. At this point, Allen testified, his wife ran into the kitchen and grabbed a butcher knife. A struggle then took place. Allen claimed that his wife struck her head on the back door. Human blood, however, was found on Allen's handgun.

After this incident, Mr. and Mrs. Allen returned to the living room and Mrs. Moore began to telephone her husband from the kitchen where she could see the Allens. Mrs. Allen was sitting on a chair and Eddie Allen was kneeling in front of her. Mrs. Moore saw Mrs. Allen attempt to rise from the chair at the time Eddie Allen started to shoot. Allen took a step toward his wife, who was lying on the floor, pointed the handgun and attempted to fire the then empty weapon. Allen said, "She is dead now. Call the police." Mrs. Moore was unable to make the call, so Allen notified the police.

Allen testified at trial that while he and his wife were in the living room she told him that if she got the chance she would kill him herself. He was nervous and reached into his pocket for a cigarette. Mrs. Allen then allegedly said something about there being a gun in his pocket and Allen testified she reached for her purse. Allen said he remembered jumping up and pulling the trigger of his gun once but did not recall firing any other shots or pointing the empty gun at his wife's body and pulling the trigger.

Allen stated that he thought his wife had a gun or knife in her purse and that he was "scared to death". He claimed that the purse was beside the chair on which his wife sat. Mrs. Moore testified, however, that both Mrs. Allen's purse

and coat were in the kitchen by the back door. Photographs of the murder scene which were introduced at trial corroborated the testimony that the purse which Allen feared contained a gun was in the kitchen and not in the living room.

When the police arrived at the house, Allen met one of the officers at the sidewalk. The officer asked what had happened and Allen replied, "I shot my wife." Allen told the officer that the gun was on the table in the house and that his wife was "hurt pretty bad."

The police officer testified that Allen appeared very calm while making these statements. The officer then entered the Moore house and attempted to give first aid to Mrs. Allen. At this point Allen was placed under arrest and after being given his *Miranda* warnings, he apparently made no further statements.

Respondent, both on direct appeal and in the habeas corpus proceeding, complained of the following colloquy on cross-examination:

> Q: [State's Attorney] Would you explain what information you gave to Officer Terry Melloy concerning your fears for your life and efforts of self defense when he came up to the house after you called? (R. 419)

An objection to the question was sustained.

> Q: [State's Attorney] Now, Mr. Allen, when the police show [sic] up pursuant to your call on January 3, 1974, at 431 West 7th in Peoria, and you talked to Officer Melloy, you never mentioned any fear for your life did you? (R. 420)
>
> DEFENSE COUNSEL: Same Objection. (R. 420)
> THE COURT: Overruled.
>
> A: Would you repeat the questions?

> Q: When the police showed up at 431 West 7th on January 3, 1974 pursuant to your call, you never told them you were in fear for your life from your wife did you?
>
> A: No.
>
> Q: In fact, you never told any law enforcement officer this did you?
>
> A: No, I didn't.
>
> Q: In fact, the first statements regarding this are from the stand in this trial aren't they? (R. 421)

An objection was overruled and a mistrial was denied. (R. 422)

> A: Yes
>
> Q: Now this King and Lemons that testified here, you never mentioned them before this trial, did you?
>
> A: No sir, I didn't. (R. 422)

Respondent also complains of the following statements made during the prosecution's closing argument:

> Now, when by the way, did the defendant first say self-defense? Did he say this of officer Terry Melloy, I just shot my wife, I had to do it, she came at me with a knife in the kitchen! Did he say that? Did he say, she was going into her purse, I thought she had a gun I had to shoot her! Or did he even say, I shot my wife in self-defense. No, none of those. He said very calmly according to Officer Melloy, I just shot my wife, she is pretty bad, she is in there, the gun is on the table. In a calm way.
>
> After he shot his wife five times and stood over her (indicating) and sent the hammer home on an empty cylinder, did he then say, oh my God, I had to do it, I thought she was going for a gun. No, what he said was, she's dead now. The defendant could not say self-

> defense because there was no self-defense. The defendant is a cold blooded, brutal murderer. (R. 485)

Defense counsel objected to these questions and statements at trial, alleging they violated his right to remain silent. The objections were overruled. The jury later convicted Allen of murder. Allen then appealed citing, among other things, the questions and statements objected to at trial.

The Illinois Appellate Court affirmed the conviction, rejecting Allen's argument that *United States* v. *Hale,* 422 U.S. 171 (1975), *Doyle's* precursor, was applicable under the facts of the case. That court held that Allen's pre-arrest statements and conduct were inconsistent with allegations made at trial concerning his state of mind at the time of the murder and that Allen could not foreclose relevant inquiry into those matters on cross-examination. This Court denied certiorari after *Doyle* v. *Ohio, supra,* was decided and cited by Allen in his petition. The District Court and Court of Appeals, however, disagreed with the state court's determination. They held that reference to be a comment on what Allen did not say and, therefore, a comment on his silence. Petitioner now brings this petition for a writ of certiorari seeking reversal of the District Court's decision issuing a writ of habeas corpus.

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT COURT OF APPEALS HAS UNREASONABLY EXTENDED THE CONSTITUTIONAL HOLDING OF *DOYLE* v. *OHIO.*

A.

The Seventh Circuit Court of Appeals Has Expanded The Strictures Of *Doyle* To Preclude Prosecution Use Of A Defendant's Volunteered Pre-Arrest, Pre-*Miranda* Warning Statements.

This Court's holding in *Doyle* v. *Ohio,* 426 U.S. 610 (1976), is clear: ". . . the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." 426 U.S. at 619. Most lower courts are in agreement. See for example, *United States* v. *Henderson,* 565 F. 2d 900 (5th Cir. 1978); *United States* v. *Brown,* 548 F. 2d 1194 (5th Cir. 1977); *Shadd* v. *United States,* 423 F. Supp. 511 (W.D. Pa. 1976); *Leon* v. *Kuhlman,* 443 F. Supp. 50 (S.D. N.Y. 1977). This Court reached that conclusion based on its observation that after *Miranda* warnings regarding right to silence have been given to an arrestee, ". . . unfairness occurs when the prosecution, in the presence of the jury, is allowed to undertake impeachment on the basis of what may be the exercise of that right." 426 U.S. at 619, n.10. This unfairness denies Due Process to the thus impeached defendant.

The Seventh Circuit and the District Court on which the Seventh Circuit relied, went far beyond the plain meaning of *Doyle.* Those courts held that the use of the present defendant's pre-arrest, pre-*Miranda* silence violates the Fifth

and Fourteenth Amendment rights against self-incrimination. Both courts relied heavily upon *United States* v. *Impson,* 531 F. 2d 274 (5th Cir. 1976). In *Impson,* that court inferred from *dicta* in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), that because the Fifth Amendment right against self-incrimination applies to everyone regardless of guilt or innocence, the use of pre-arrest, pre-*Miranda* silence for purposes of impeaching a defendant's testimony violates the Fifth and Fourteenth Amendments.* That interpretation ignores the crux of the *Doyle* holding, *viz.,* that "every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." *Doyle,* 426 U.S. at 617.

Petitioner must emphasize here that respondent Allen was not silent prior to his arrest. The lower court, nevertheless, held that comments of respondent's voluntary pre-arrest statements were impermissible comments on silence.

The right to silence has never been so far extended by this Court. It has always been subject to the limitations that justice demands. For example, statements acquired in violation of *Miranda* may under some circumstances be used to impeach a defendant. *Harris* v. *New York,* 401 U.S. 222 (1971); *Oregon* v. *Haas,* 420 U.S. 714 (1975). Similarly, a defendant's failure to take the stand at an earlier trial may be used to impeach him when he testifies at a second trial. *Raffel* v. *United States,* 271 U.S. 494 (1925). Protection of the constitutional right against self-incrimination

---

* *Impson* was one of those cases which arose out of this Court's decision in *United States* v. *Hale,* 422 U.S. 171 (1975). Such circuit court decisions created the confusion which *Doyle* was meant to relieve. Thus, *Impson* is of dubious validity.

does not provide the defendant "with a shield against contradiction of his untruths." *Walder* v. *United States,* 347 U.S. 62, 65 (1954).

This Court held that the use for impeachment purposes of a defendant's silence after he has been informed of his right to remain silent violates concepts of fundamental fairness. With this assessment of constitutional rights petitioner has no quarrel. Petitioner suggests, however, that it is not fundamentally unfair to use a defendant's voluntary pre-arrest statements together with conduct to refute a position taken at trial where inconsistency is apparent. Where factual events appear inconsistent with a trial defense, refusal to permit such impeachment allows a defendant to perjure himself without fear of contradiction while at the same time protecting no constitutional right.**

Allen testified at trial that he was scared to death that his wife was going to shoot him. As his statements and conduct immediately after the shooting indicate, however, he acted and spoke calmly. The totality of his demeanor, when coupled with the statements he did make after the shooting and at the time of the murder, was indeed inconsistent with his trial assertions concerning his state of mind. The Seventh Circuit thus went far beyond the protections safeguarded by *Doyle* when it held the prosecution's questions and comments violated Fifth and Fourteenth Amendment guarantees.

** Petitioner concedes that certain of the questions on cross-examination may have gone beyond the scope permitted by due process. Those overly broad questions, however, are few and fall within the standards for harmless error. The majority of the questions, and all of the closing argument, fall within the pre-arrest time frame and one clearly directed at permissible lines of inquiry.

B.

The Seventh Circuit Court of Appeals Unreasonably Expanded The Concept Of What Constitutes A Comment On Silence.

Regardless of whether this Court would permit the use of pre-arrest, pre-*Miranda* silence to impeach a defendant at trial, given the facts in this case this Court may not have to reach that question. Respondent Allen, at the time of his arrest and before, was not silent. At the time he shot his wife and when the police arrived later, Allen made voluntary, spontaneous statements which were wholly admissable in evidence at trial.

The use of volunteered statements for *any* purpose is not barred by the Fifth Amendment. *Miranda* v. *Arizona,* 384 U.S. 436, 478 (1966). Once a defendant takes the stand and testifies on his own behalf, the truth-seeking function should not be unnecessarily curtailed. The courts below, however, held that the use of the volunteered statements to impeach Allen's contention at trial regarding his state of mind at the time he murdered his wife amounted to comments upon what Allen did not say. That court concluded that because Allen's statements were not in direct contradiction with his testimony at trial, their use for impeachment amounted to comment upon silence.

That view of what constitutes a comment upon silence goes far beyond the constitutional requirements and far beyond well-recognized rules of evidence. See, for example, 3A Wigmore § 1040. Under Illinois law a statement does not have to be literally inconsistent with a subsequent allegation to be used at trial for impeachment purposes. *People* v. *Henry,* 47 Ill. 2d 312, 320, 265 N.E. 2d 876 (1970). Indirect inconsistency is sufficient to make a statement admissible.

It is enough that the witness omits particular facts which, if true, he would be likely to have mentioned. *Carroll* v. *Krause,* 295 Ill. App. 552, 15 N.E. 2d 323 (1938). Having opened the door to the question of his state of mind and to the content of the statements he made to the police, Allen should not be permitted to foreclose a relevant injury into those matters on cross-examination nor prevent comment upon the inconsistency of those statements with his asserted state of mind. *People* v. *Allen,* 37 Ill. App. 3d 619, 346 N.E. 2d 486, 489 (1976). Since Allen did make statements before and at the time of arrest, there is no constitutional infringement in questioning him regarding omissions in what he said. *Twyman* v. *Oklahoma,* 560 F. 2d 422 (10th Cir. 1977).

The Illinois Appellate Court, relying upon *Doyle's* predecessor, *United States* v. *Hale,* 422 U.S. 171 (1975), found that Allen's pre-trial statements were in fact inconsistent with the posture taken at trial.* Allen took the position at trial that although he had killed his wife by shooting five bullets into her body, he was justified in doing so because he was scared to death. Nevertheless, his conduct and statements contradicted that assertion. He had simply said, "She's dead now" after he shot his wife. He had notified the police because the eyewitness had been too distraught to dial the telephone. When the police arrived, Allen's manner was calm and composed; with no indication that he had only moments before been so terrified that he felt compelled to take a human life. The prosecution's inquiry into those

---

* The Court of Appeals apparently would insist that the only possible permissible inconsistent statement is one which is literally inconsistent, such as: "I shot my wife in cold blood and without legal justification." This flies in the face of recognized rules of evidence and logic.

statements on cross-examination and his comments upon the inconsistency of those statements with Allen's self-defense justification theory at trial was wholly within permissible limits of impeachment by prior inconsistent statements.

Even those cases which came after *Doyle* have not required literal inconsistency as a requisite for a constitutionally permissible comment on a prior inconsistent statement. See, for example, *United States* v. *Mireles,* 570 F. 2d 1287 (5th Cir. 1978); *Twyman* v. *Oklahoma, supra; United States* v. *Davis,* 546 F. 2d 617 (5th Cir. 1977). The Seventh Circuit has plainly misinterpreted this Court's decision in *Doyle* v. *Ohio,* and correction and clarification should be made by this Court.*

II.

THERE EXISTS BETWEEN THE CIRCUITS AND BETWEEN FEDERAL AND STATE COURTS A CONFLICT IN RATIONALE REGARDING IMPEACHMENT BY SILENCE, THUS CAUSING CONFUSION AMONG THE LOWER COURTS.

This Court in *Doyle* v. *Ohio* left open at least three questions which have not yet been resolved: whether the decision may be extended to pre-arrest, pre-*Miranda* silence; what constitutes an actual comment upon silence; and how

* The Seventh Circuit apparently has no problem in extending *Doyle* into areas not contemplated by this Court. See Judge Swygert's opinion in *United States* v. *Kopel,* 552 F. 2d 1265 (7th Cir. 1977). *Doyle* extended to apply to references to a witness's consultation with his attorney during a grand jury proceeding.

far the doctrine of harmless error may be extended.* These questions have arisen in the past and may be expected to arise again. Until this Court makes a definitive pronouncement, conflicts will exist among the courts.

The Seventh Circuit below held that *Doyle,* despite its plain language, applies to pre- as well as post-arrest silence. By implication, in view of the facts in the case, the court also suggests that the concepts of fairness protected in *Doyle* may be used to curtail impeachment by prior inconsistent statements in situations where those statements are interpreted to be not literally inconsistent. Further, the court implies that even where error is minimal, if the error goes to some vital factor, like a defendant's credibility, error in the nature of a *Doyle* violation may never be harmless.

Two recent Illinois Supreme Court decisions seem to take the position that in order to properly impeach a defendant's in-court exculpatory story with statements previously volunteered by the defendant, those statements must be unambiguously inconsistent with the explanation offered at trial. See, *People* v. *Beller,* No. 50334 (Slip. Op. Nov. 1978) and *People* v. *Green,* No. 50240 (Slip. Op. Nov. 1978). In both cases, however, the court found the error to be harmless beyond a reasonable doubt and affirmed the convictions. Moreover, in both *Beller* and *Green* the statements used to impeach the defendants had been made after their arrests. In the case at bar, the statements used were made by respondent immediately upon the police arrival at the crime scene.

* Harmless error is discussed below.

There is apparent confusion among the circuits in this area of the law. The Seventh Circuit has found that the constitutional protection against impeachment by silence applies to pre-arrest as well as post-arrest situations; in accord with the Seventh Circuit are, for example, *United States* v. *Henderson,* 565 F. 2d 900 (5th Cir. 1978); *Leon* v. *Kuhlman,* 443 F. Supp. 50 (S.D. N.Y. 1977), (*Leon* takes the unique position that although *Doyle* applies to post-arrest silence only, *Hale* protects against the use of pre-arrest silence). In direct conflict, however, are *United States* v. *Davis,* 546 F. 2d 617 (5th Cir. 1977), and *United States* v. *Agee,* 440 F. Supp. 614 (E.D. Pa. 1977).

Even more confusing is the question of whether there may exist an impermissible comment on silence where the arrestee made a voluntary statement later used to impeach his trial testimony. The courts below implied strongly that any impeachment by any statement not directly inconsistent is an unconstitutional comment on silence. This view, while shared by some courts' strict interpretation of *Doyle,* is tempered by other courts which recognize the fairness in using statements (and occasionally silence) against a witness who takes an inconsistent position at trial. See, for example, *United States* v. *Mireles,* 570 F. 2d 1287 (5th Cir. 1978); *Twyman* v. *Oklahoma,* 560 F. 2d 422 (10th Cir. 1977), (comment on omission in purportedly complete statement made to police); *United States* v. *Mitchell,* 558 F. 2d 1332 (8th Cir. 1977), (when confronted with fact of false statement given to officers, defendant remained silent); *United States* v. *Conlin,* 551 F. 2d 534 (2d Cir. 1977), evidence allowed to dispute defendant's statement that he had told exculpatory story to officers); *United States* v. *Davis,* 546 F. 2d 617, 662 n. 4 (5th Cir. 1977), (before arrest and *Miranda* warnings defendant ran and shouted to officers that they

might as well shoot but made no exculpatory statement); *United States* v. *Riggs,* 537 F. 2d 1219 (4th Cir. 1976), (repeated comments about stolen money supported reference to accompanying silence).

The federal courts below directly contradicted the Illinois court's assessment of the constitutional questions in the case here. A recent Illinois Supreme Court case underlines the divergence of its rationale from that of the federal courts in Illinois. See, *People* v. *Rehbein,* No. 50216 (Slip. Op. Sept. 1978). Thus it is apparent that unless this Court clarifies the questions remaining from *Doyle,* the federal courts will remain in conflict with the courts of this state. Of even greater concern is that, as in the present case, a defendant who loses an appeal in a state court with a finding that no impermissible comment on silence was made will bring a petition for writ of habeas corpus with the federal courts acting as a super-state appellate court.

III.

THE SEVENTH CIRCUIT COURT OF APPEALS SHOULD HAVE ADDRESSED THE QUESTION OF RETROACTIVE APPLICATION OF *DOYLE* AND SHOULD HAVE HELD IT TO BE APPLICABLE PROSPECTIVELY ONLY.

Even if the rule in *Doyle* v. *Ohio* is considered applicable, it should not be applied retroactively to a case tried over two years prior to the *Doyle* decision. As was pointed out to both the District Court and Seventh Circuit Court of Appeals, *Doyle* was decided after the respondent's conviction, after the Illinois Appellate Court affirmed, having had the benefit of the *Hale* decision, and yet before this Court denied certiorari to the present respondent. 97 S. Ct. 1603

(1977). The District Court, however, found that *Doyle* was controlling in the present case. *Doyle* should not be applied retroactively.

Clearly *Doyle* is a landmark case which has set forth a new rule of procedure—that an arrested person's post-arrest, post-*Miranda* silence may not be used to impeach an explanation subsequently offered at trial. *See Doyle* v. *Ohio, supra.* Many times when a decision of the United States Supreme Court has set forth new rules of criminal procedure, the court has held that such a rule shall not be given retroactive application.

Several recent trend-setting cases are good examples. *Linkletter* v. *Walker,* 381 U.S. 718 (1965), refused to retroactively apply *Mapp* v. *Ohio,* 367 U.S. 643 (1961). Similarly, in *Johnson* v. *New Jersey,* 384 U.S. 719 (1966), the Court held that *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), and *Miranda* v. *Arizona,* 384 U.S. 436 (1966), were only applicable to trials begun after the dates of those decisions.

In order to determine whether the new rule of procedure is to be given retroactive application, as a threshold matter, the court must determine whether the new rule remedies a significant or a substantial defect in the truth-finding process of trial, a defect which raises serious questions about the accuracy of guilty verdicts in past trials, *Williams* v. *United States,* 401 U.S. 646, 653 (1971); *Bailey* v. *Holley,* 530 F. 2d 169, 172 (7th Cir. 1976).

Doyle v. *Ohio,* a case which involves a defendant's Fifth Amendment privilege, does not remedy a defect in the truth-seeking function of trial. In *Doyle* this Court upheld a defendant's right not to be impeached at trial by his silence after being given *Miranda* warnings. This Court made no suggestion, however, that the forbidden practice

was frustrating the *truth-seeking* function of trial. In fact, this Court recognized the importance of prosecutors being allowed wide leeway in the scope of impeachment on cross-examination so as not to discourage that very function of trial—the ascertainment of truth. *Doyle,* as a threshold matter, therefore, should not be applied retroactively.

Looking next to the balancing criteria regarding retroactive application as set out in *Halliday* v. *United States,* 394 U.S. 831, 832 (1968), it becomes apparent that the *Doyle* decision should apply prospectively only. The *Halliday* criteria considers: 1) the purpose of the new rule; 2) the extent of reliance upon the old rule; and 3) the effect retroactive application would have upon the administration of justice.

To this end, the case of *Tehan* v. *United States,* 382 U.S. 506 (1966), is instructive. *Tehan* ruled that *Griffin* v. *California,* 380 U.S. 609 (1965) should not be applied retroactively. *Griffin* held that a defendant who elects not to testify may not have his silence used against him. Since *Doyle* is an outgrowth of *Griffin,* the *Tehan* court rationale for denying retroactive application to *Griffin* is of special interest. *Tehan* reasoned that:

> The basic purpose of a trial is the determination of truth. . . . By contrast the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege; like the guarantees of the Fourth Amendment, stands as a protection of quite different values—reflecting the concern of our society for the right to be let alone. 382 U.S. at 416.

The purpose of *Doyle,* to prevent a defendant from being confronted at trial with his past *Miranda* silence, does not compel retroactive application for similar reasons.

As to the effect retroactive application would have, in referring to the number of cases in which a prosecutor may have commented on a defendant's refusal to testify prior to the *Griffin* decision, this Court in *Tehan* at 382 U.S. 418, noted that retroactive application of *Griffin* would "create stresses upon the administration of justice more concentrated but fully as great as would have been created by a retroactive application of *Mapp*." Doubtless there have been innumerable criminal trials during which the prosecutor made some reference to a defendant's post-arrest silence. To subject these convictions to collateral attack would place a serious burden on our criminal justice system.

Finally, it is suggested that a prosecutor could not have reasonably been expected to have foreseen the change in criminal law that *Doyle* brought. His reliance on the law in effect at the time of trial would be reasonable and there is no compelling reason to hold the state to a stricter rule which took effect at a later date.

For these reasons, *Doyle* should be applied prospectively only.

IV.

THE SEVENTH CIRCUIT COURT OF APPEALS ERRED WHEN IT HELD THAT CERTAIN QUESTIONS ASKED ON CROSS-EXAMINATION DID NOT CONSTITUTE HARMLESS ERROR.

In the District Court and Seventh Circuit Petitioner conceded that the following questions on cross-examination were arguably sufficiently overbroad to fall within the proscription of *Doyle* v. *Ohio,* 426 U.S. 610 (1976):

> In fact, you never told any law enforcement officer [that you were in fear for your life from your wife], did you?
>
> • • •

> In fact, the first statements regarding this are from the stand in this trial aren't they?
>
> • • •
>
> Now this King and Lemons that testified here, you never mentioned them before this trial, did you? (R. 422)

Petitioner urged, however, that those questions were harmless when viewed within the context of the trial as a whole, and in light of the evidence and arguments considered by the jury.

Without doubt, the harmless error doctrine is applicable to cases where *Doyle* applies. 426 U.S. at 620-621. The District Court, however, felt that it could not find beyond a reasonable doubt that the error could not have contributed to the jury's verdict. Petitioner urges that the District Court's finding which the Seventh Circuit adopted was clearly erroneous and that this Court may and should find any error to be harmless.

It is well-settled that not every constitutional error is of such a magnitude that automatic reversal is required. *Connelly* v. *DeChristoforo,* 416 U.S. 637 (1968); *Chapman* v. *California,* 386 U.S. 18 (1967); *United States* v. *Reed,* 392 F. 2d 865 (7th Cir. 1968), *cert.* den., 393 U.S. 984 (1968). Some errors are so insignificant within the setting of a particular case that they may be deemed harmless. *Chapman* v. *United States,* 547 F. 2d 1240 (5th Cir. 1977), *cert. den.,* 341 U.S. 908 (1977).

An error does not amount to a constitutional violation if it is harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U.S. 18 (1967). To determine if an error meets the standard for harmlessness enunciated in *Chapman* v. *California, supra,* this Court must ask itself if the error

would have affected the jury's verdict, looking at the impact which the error *in its total setting* would have had on the minds of other men. *United States* v. *Garafolo,* 385 F. 2d 200 (7th Cir.), vacated on other grounds, 390 U.S. 144 (1968) on remand, 396 F. 2d 952 (7th Cir. 1968).

Judicial application of the harmless error rule does not require that this Court indulge in assumptions of irrational jury behavior when a perfectly rational explanation exists for the jury's verdict. Unless there is a reasonable possibility that the improper statement contributed to the jury's verdict, reversal is not required. *Schneble* v. *Florida,* 405 U.S. 427 (1972).

The District Court's determination was clearly erroneous for three reasons. First, it presumed that all of the challenged questions and comments were in fact questions and comments on respondent's silence as prohibited by *United States* v. *Hale* 422 U.S. 171 (1976), and *Doyle*. *See* District Court Opinion, A13. The arguments made above by the petitioner clearly show that that presumption was in error. *Doyle* and *Hale* do not apply to those comments upon a defendant's pre-arrest statements, nor in any event were those questions and comments references to respondent's silence as prohibited by *Hale* and *Doyle*.

Secondly, the District Court attempted to distinguish those cases which hold comments on silence to be harmless from the case at bar. It is true that no facts exactly like the case at bar have been held to be either harmless or harmful and, indeed, this Court has not yet decided what limits to place on the harmless error doctrine where there has been a *Doyle* violation. However, in examining recent cases dealing with the harmlessness of comments on post-arrest silence the Court will note the following.

In those cases in which comment on a defendant's post-arrest silence has been held to be harmless, references to the defendant's failure to make an exculpatory story was, as here, minimal. *See,* for example *Chapman* v. *United States,* 547 F. 2d 1240 (5th Cir. 1977), *cert.* den., 431 U.S. 908 (1977); *United States* v. *Earl,* 529 F. 2d 1145 (6th Cir. 1976). Questions relating to silence have, under certain circumstances, been held to be harmless even where the questioning was extensive. *United States* v. *Wycoff,* 545 F. 2d 679 (9th Cir. 1976), *cert.* den., 429 U.S. 1105 (1977).

The harmlessness of a comment on silence also depends to a great degree upon an examination of the extent of other properly admitted evidence to determine the impact of the improper comment on a jury. *Morgan* v. *Hall,* 569 F. 2d 1161 (1st Cir. 1978). Where evidence of guilt is otherwise overwhelming, courts have ordinarily found minor, arguably impermissible references to silence to have had minimal impact on a reasonable jury and thus were harmless beyond a reasonable doubt. *United States* v. *Davis,* 546 F. 2d 583 (5th Cir. 1977), *cert.* den., 431 U.S. 906 (1977); *Leake* v. *Cox,* 432 F 2d 982 (4th Cir. 1970).

Comment on post-arrest silence was not harmless where no eyewitness to a crime was available and the defense turned *entirely* on the defendant's credibility. *Reid* v. *Riddle,* 550 F. 2d 1003 (4th Cir. 1977). By contrast in this case, the eyewitness to the murder completely undercut petitioner's version of the facts.* Consequently, it is clear that case law does not insist upon the District Court's con-

---

*Note that in Doyle the Supreme Court suggested that a claim of harmless error might have been successfully raised in that case even though no direct governmental evidence refuted defendant's exculpatory story.

clusion. On the contrary, precedent strongly suggests that the challenged questions referred to here are in fact harmless beyond a reasonable doubt.

Finally, and most significantly, the District Court erred in its application of the harmless error doctrine to the facts in this case. As was discussed earlier in this section, the alleged constitutional violation must be examined in the context of the record as a whole and probable impact on the minds of the jury. *Harrington* v. *California,* 395 U.S. 250 (1969).

The District Court correctly noted that sufficiency of evidence to convict is immaterial. District Court Opinion, A18.** The court, however, ignored the fact that the overwhelming impact of the state's evidence is a vital factor in examining the impact of alleged error on the minds of jury members. *See Schneble* v. *Florida, supra,* 405 U.S. at 430; *Stone* v. *Estelle,* 556 F. 2d 1242 (5th Cir. 1977).

Again, the prejudicial effect of improper comment must be weighed against the weight of properly admitted evidence. *Morgan* v. *Hall,* 569 F. 2d 1161 (1st Cir. 1978). The District Court failed to weigh properly the State's overwhelming evidence against the respondent. The record as a whole clearly shows that the alleged error, when viewed in the total context of the trial, could have had no significant effect on the jury.

Respondent's sole defense was that he was so frightened of his wife that killing her as he did was legally justified. The District Court referred to an earlier unsuccessful at-

---

**Petitioner at no time during the appellate process complained of the sufficiency of the evidence which resulted in his conviction.

tack by Judith Allen upon the respondent and evidence regarding prior death threats (as to which we have only respondent's word that he knew of them before the murder). The court, relying on dictum from a Fifth Circuit case *Chapman* v. *United States,* 547 F. 2d 1250 (5th Cir. 1977) *cert. den.,* 431 U.S. 908 (1977), found the questions and comments not to be harmless beyond a reasonable doubt. Opinion, A19. Had the court below looked at the record as a whole, it would have found evidence refuting respondent's alleged fears to be so overwhelming as to render any possible error harmless beyond a reasonable doubt.

The record indicates that respondent bought a gun before he could have heard of any death threat. (R. 380-89) He checked that the ammunition was the proper caliber immediately before the murder. (R. 397-8)

The earlier "attack" and the death threats, moreover, simply laid the background for the events of January 3, 1974, which the jury evaluated. On that day, after assuring himself that he had bullets for his gun, he went uninvited to the apartment where his wife was staying. (R. 107) He and his wife argued there; respondent chased his wife with a gun (R. 108), and she struck her head. Respondent alleges she had threatened him with a knife and hit her head on the kitchen door. (R. 405) The knife she allegedly dropped was nowhere to be found. (R. 427) The respondent's gun was covered with human blood (R. 278-289) from which the jury must reasonably have concluded that the deceased in fact was struck in the head with the gun and not a door. This point was presented to the jury in closing argument.

The crux of respondent's defense was that his wife was allegedly reaching into her purse for what he feared was a gun. Respondent's claim that his wife's purse was at her

side when he shot her was soundly refuted. Margaret Moore testified that the purse was with Mrs. Allen's coat and glove in the kitchen (apparently carried there when she had earlier tried to escape from her husband). (R. 111-2, 116, 200 and 1426) Photographs of the murder scene also tended to establish that Mrs. Moore and not Mr. Allen was telling the truth. The single fact which might have justified any violent reactions by respondent was missing from his defense. (R. 197-200)

To further rebut respondent's assertion regarding his state of mind, the prosecution then presented impeaching evidence showing he had acted calmly both when he killed his wife and immediately thereafter. To this end the prosecutor cross-examined respondent as to statements he made at that time. (R. 419-422) The offending questions appeared in the midst of this valid impeachment. (R. 422)

As can be seen in the statement of facts above and in the record as a whole, it is obvious that the jury could have reached no conclusion other than that respondent's state of mind at the time of the murder was not as he alleged at trial. Even without the offending questions the evidence of respondent's guilt is overwhelming.

When viewed in the context of the trial and the proposition they went to support, the harmlessness of any constitutional violation is inescapable. A review of the closing argument shows that the prosecutor only sought to prove the inconsistency of respondent's spontaneous conduct statements with those of a man who had been in desperate fear for his life.

The prosecutor noted that despite respondent's alleged emotional state he had talked very calmly to the police. When he shot his wife he didn't say "oh my God, I had to

do it, I thought she was going for a gun." He simply said, "She's dead now." (R. 485) Subsequent closing argument went on to demonstrate the incredibility of respondent's defense and did not refer to respondent's failure to give an eexculpatory statement prior to trial. Isolated from the totality of the trial the challenged questions may arguably appear egregious. When viewed within the context of the trial as a whole, however, they take on a different character. Even if improper, those questions were at most mild, ambiguous, and harmless beyond a reasonable doubt. *United States* v. *Mireles*, 570 F. 2d 1287 (5th Cir. 1978).

In light of the minimal emphasis placed on respondent's failure to make an exculpatory statement prior to trial, the obvious implausibility of his self-defense justification theory, and the overwhelming evidence of his guilt, this Court must reach the conclusion that any error committed at trial was harmless beyond a reasonable doubt.

CONCLUSION

For these reasons, the Writ of Certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
DONALD B. MACKAY,
MELBOURNE A. NOEL, JR.,
WILLIAM M. WIPPOLD,
Assistant Attorneys General,
188 West Randolph Street,
Chicago, Illinois 60601,

Attorneys for Petitioners.

MICHAEL M. MIHM,
State's Attorney,
Peoria County, Illinois,

Of Counsel.

IN THE

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 78-2140

UNITED STATES OF AMERICA EX REL. EDDIE ALLEN,
Petitioner-Appellee,

v.

CHARLES J. ROWE, ET AL.,
Respondents-Appellants.

Appeal from the United States District Court for the Southern District of Illinois, Northern Division.
No. 78-C-1016—**Robert D. Morgan**, Judge.

ARGUED DECEMBER 8, 1978 — DECIDED JANUARY 8, 1979

Before SWYGERT, LAY* and PELL, *Circuit Judges.*
PER CURIAM.

This case presents the question whether a criminal defendant's Fifth and Fourteenth Amendment rights were violated when a state prosecutor was permitted at trial to cross-examine the defendant about his silence during police custody and to comment upon his silence before the jury during closing argument. We agree with the district courts conclusion that defendant-petitioner's rights were violated

---

* The Honorable Donald P. Lay, United States Circuit Judge for the Eighth Circuit, sitting by designation.

and affirm the court's order granting petitioner's motion for summary judgment, vacating the judgment of conviction, and remanding the case for a new trial.

Petitioner, Eddie Allen, as tried and convicted of murder in a jury trial in the Circuit Court of Peoria County. On June 21, 1974 Allen was sentenced to a prison term of eighteen to fifty years. The conviction was affirmed by the Illinois Appellate Court, Third Judicial District. *People* v. *Allen,* 37 Ill. App. 3d 619 (1976). The Supreme Court of Illinois denied Allen's leave to appeal, and the United States Supreme Court denied his petition for a writ of certiorari. *Allen* v. *Illinois,* 430 U.S. 956 (1977).

Allen filed a petition for federal habeas corpus relief, 28 U.S.C. § 2254, in the United States District Court for the Southern District of Illinois, on February 8, 1978. On July 24, 1978 the district court granted Allen's request for habeas relief, and allowed the State of Illinois ninety days to either give Allen a new trial or release him. The State appealed the district court's order on August 16, 1978 and, on October 6, the district court stayed its July 24 order pending this appeal.

Allen shot and killed his wife on January 3, 1974. Allen called the police, and when an officer arrived and asked him what had happened, Allen answered, "I shot my wife." A few moments later, as he was being searched, Allen added that the gun was on a table in the house and that his wife was hurt "pretty bad." Allen was read his *Miranda* warnings and said nothing more. (These facts are described in more detail in Judge Morgan's Decision and Order which is attached as an appendix to this opinion.)

At trial, the prosecutor, in order to undermine Allen's self-defense theory of justification, cross-examined Allen

about his silence in the wake of the shooting. Later, in his closing argument to the jury, the prosecutor argued that Allen's silence was inconsistent with his self-defense contention. The district court concluded that these prosecutorial actions violated the Fifth Amendment standards established in *United States* v. *Hale,* 422 U.S. 171 (1975), and *Doyle* v. *Ohio,* 426 U.S. 610 (1976), and that these violations did not constitute harmless error. *See Chapman* v. *California,* 386 U.S. 18 (1967). We agree, and adopt the thorough and well-reasoned decision of Judge Morgan.

AFFIRMED.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION

UNITED STATES OF AMERICA
EX REL. EDDIE ALLEN,
Petitioner,
v.
CHARLES J. ROWE, ET AL.,
Respondents.
No. 78-1016

DECISION AND ORDER

Petitioner is presently a prisoner seeking the issuance of a writ of habeas corpus under the provisions of 28 U.S.C. § 2254. He is being held in state custody at the Pontiac Correctional Center, Pontiac, Illinois. He contends that he is confined unlawfully because his right to remain silent under the Fifth and Fourteenth Amendments to the United States Constitution was unlawfully denied him when the prosecutor was allowed to cross-examine petitioner about his silence during custody and to comment upon his silence before the jury during closing argument. This court has determined that under established law petitioner's constitutional right to remain silent was infringed, and that this infringement was not harmless error. Accordingly, petitioner's motion for summary judgment must be allowed, and respondent's motion to dismiss must correspondingly be denied.

Petitioner was tried and convicted of the murder of his wife, in a jury trial in the Circuit Court of Peoria County. A sentence of imprisonment for a term of 18 to 50 years

was imposed. Petitioner appealed his conviction to the Appellate Court of Illinois, Third Judicial District. *People* v. *Allen,* 37 Ill. App. 3d 619, 346 N.E. 2d 486 (1976). One of the issues raised on appeal was whether petitioner's constitutional right to remain silent was violated by the prosecutor's cross-examination and closing argument to the jury. In a split decision, the state Appellate Court held that petitioner's right to remain silent under the Fifth and Fourteenth Amtndments had not been violated.

Subsequently, Allen petitioned for leave to appeal to the Supreme Court of Illinois and for a writ of certiorari in the Supreme Court of the United States. Both petitions were denied. 97 S. Ct. 1603 (1977). Thus, it appears that petitioner has exhausted his state judicial remedies and is properly before this court pursuant to the provisions of 28 U.S.C. § 2254.

I

There is no dispute about the fact that Allen shot and killed his wife. The shooting took place on January 3, 1974 at approximately 3 p.m. Following Allen's call to the police, Officer Terry Melloy of the Peoria Police Department was dispatched to investigate a shooting at the home of Margaret and Daniel Moore. Upon his arrival at the Moore residence, Officer Melloy was met at the sidewalk by Allen. Melloy testified that Allen appeared calm and showed no emotion whatsoever. When asked by the officer what happened, Allen replied, "I shot my wife." As the officer was patting him down for weapons, Allen told Officer Melloy that the gun was on a table inside the house and that his wife was hurt "pretty bad."

At this point, Allen and Officer Melloy entered the Moore house. The officer sat Allen down on a couch and assisted

another officer in administering first aid to Mrs. Allen. While the other officer was attending to the victim, Officer Melloy read Allen his *Miranda* warnings, which included the admonishment that, "Anything you say can and will be used against you in a court of law." Allen acknowledged that he understood his rights and said nothing further.

At trial, Allen relied on a self-defense theory of justification. During the prosecutor's cross-examination of Allen, the following colloquy took place, over objection of defense counsel, which colloquy serves as the basis for petitioner's Fifth Amendment claim:

> "Q. [State's Attorney] Would you explain that information you gave to Officer Terry Melloy concerning your fears for your (sic) life and efforts of self-defense when he came up to the house after you called?"

Defense counsel objected to this question; the objection was sustained and the jury was instructed to disregard it.

> "Q. [State's Attorney] Now, Mr. Allen, when the police show (sic) up pursuant to your call on January 3, 1974, at 431 West 7th in Peoria, and you talked to Officer Melloy, you never mentioned any fear for your life did you?
>
> DEFENSE COUNSEL: Same Objection.
> THE COURT: Overruled.
>
> A. Would you repeat the question?
>
> Q. When the police showed up at 431 West 7th on January 3, 1974 pursuant to your call, you never told them your were in fear for your life from your wife did you?
>
> A. No.
>
> Q. In fact, you never told any law enforcement officer this did you?
>
> A. No, I didn't.

> Q. In fact, the first statement regarding this are from the stand in this trial aren't they?

Out of the presence of the jury, defense counsel objected to this line of questioning on the ground that the prosecution may not permissibly comment about a defendant's refusal to make a statement, and moved the court to declare a mistrial. The objection was overruled and the motion for mistrial denied.

> "Q. [State's Attorney] Would you repeat the question?
>
> COURT REPORTER: In fact, the first statements regarding this are from the stand in this trial aren't they?
>
> A. Yes.
>
> Q. Now this King and Lemons that testified here, you never mentioned them before trial, did you?
>
> A. No sir, I didn't."

The State's Attorney made the following statements to the jury during closing argument:

> "Now, when by the way, did the defendant first say self-defense? Did he say this to officer Terry Melloy, I just shot my wife, I had to do it, she came at me with a knife in the kitchen! Did he say that? Did he say, she was going into her purse, I thought she had a gun, I had to shoot her! Or did he even say, I shot my wife in self-defense. No, none of those. He said very calmly, according to Officer Melloy, I just shot my wife, she is pretty bad, she is in there, the gun is on the table. In a calm way."
>
> * * *
>
> "After he shot his wife five times and stood over her (indicating) and sent the hammer home on an empty cylinder, did he then say, oh my God, I had to do it, I

thought she was going for a gun. No, what he said was, she's dead now. The defendant could not say self-defense because there was no self-defense. The defendant is a cold blooded, brutal murder (sic)."

The evidence relating to the events which occured immediately prior to the fatal shooting consisted entirely of the conflicting testimony of Margaret Moore, Mrs. Allen's sister-in-law, and that of Allen himself.

Mrs. Moore testified on behalf of the State, that on the date of the incident, January 3, 1974, Allen and his wife were separated and Mrs. Allen was residing with the Moores. She testified that Mrs. Allen returned from work to the Moore home at approximately 3 p.m.; that Allen arrived a short time later; that upon Allen's arrival Mrs. Moore went to the bathroom to do some mopping, leaving the Allens alone in the living room so that they could have some privacy; that while in the bathroom with the door closed, she heard Mrs. Allen run past the bathroom toward the back door screaming that her husband had a gun.

Further, according to Mrs. Moore, Allen caught his wife at the back door, at which time Mrs. Moore heard a sound which she described as "A blow, sort of like a crash." She heard a scream, opened the bathroom door, looked out, observed that Mrs. Allen was bleeding from the back of her head, saw Allen with his right arm around his wife, and asked Allen to please let her go. He did, and Mrs. Allen went into the bathroom where Mrs. Moore washed the blood off from around the wound.

Mrs. Moore says she then suggested that Allen leave and come back later, but he refused. She described Allen's wife as being "kind of incoherent" at the time. Allen was asking a lot of questions and his wife was holding on to Mrs.

Moore. A couple of minutes later all three went into the living room to talk things over. According to Mrs. Moore, Mrs. Allen did not take her coat and purse into the living room with her, she left them at the back door. Mrs. Allen sat in a chair and Allen squatted in front of her.

Mrs. Moore says she started to call her own husband from a telephone on the kitchen wall, a position from which she could see both Allen and his wife. Before she had completed her call, Mrs. Moore observed Allen shoot his wife five times with a handgun. She simultaneously saw Mrs. Allen attempting to rise from the chair and move toward the front door. After the last shot, she saw Allen take a step toward his wife, who was lying on the floor, and pull the trigger on the then empty weapon.

Allen turned to Mrs. Moore and said, "She is dead now. Call the police." Mrs. Moore was unable to make the call, so Allen called the police. Mrs. Moore testified that Allen told her to relax because he would not hurt her. She stated that she wanted to leave, but Allen wanted her to stay, saying, "No, I had to be his witness." Allen then walked out the front door and met Officer Melloy.

Allen's version of what transpired at the Moore home is decidely different from that of Mrs. Moore. Allen testified that he went to the Moore house to meet his wife to discuss a divorce. Upon his arrival, Mrs. Moore left Allen and his wife alone in the living room. When Allen informed his wife that he knew about the man with whom she was having an affair and their plan to kill him, she got excited, grabbed for her purse but missed it, ran to the kitchen and picked up a butcher knife. A struggle ensued, in which Mrs. Allen fell and struck her head against the kitchen door. Mrs. Allen called for Mrs. Moore, who came out of the bathroom. The

two women went into the bathroom where Mrs. Moore washed the cut on Mrs. Allen's head.

Some conversation took place in the bathroom; then, at Mrs. Allen's suggestion, all three went into the living room. Mrs. Allen sat down in a chair while her husband squatted on the floor in front of her. While Mrs. Moore went to use the telephone in the kitchen, Allen's wife told him she wouldn't be happy until he was dead and that if she got the chance she would kill him herself. Allen claims he reached into his coat pocket for a cigarette. His wife told him not to reach any further because she knew he had a gun. She reached into her purse and started to get up. At this point Allen remembered telling her to stop, then jumping up and shooting her. He said he did not remember firing the gun more than once, nor did he remember pointing the empty gun at his wife's body and pulling the trigger on the empty chamber. After the shooting Allen telephoned the police, whom he met outside shortly thereafter.

Allen testified that he thought his wife had a gun or knife and that when she started to get out of her chair and reached into her purse, he thought she was trying to kill him. He said he was "scared to death." According to Allen, he purchased the handgun for his protection because his wife threatened to have him killed. The evidence showed that Allen bought the handgun on December 29, 1973, and that he purchased bullets on January 3, 1974, shortly after his wife failed to show up for an appointment with their marriage counselor.

At trial the defendant called several witnesses to testify about events leading up to, and circumstances surrounding, the fatal shooting, in an attempt to show that he acted in self-defense. Testimony was presented indicating that each

of the Allens had made prior death threats against the other. However, Mrs. Moore stated that she and Mrs. Allen had been close friends for seven years and that she did not know of any threats against Mrs. Allen's life by Eddie Allen prior to January 3, 1974.

Both Mr. and Mrs. Moore testified for the defense that several days prior to the fatal shooting, Mrs. Allen attacked her husband, first with a steak knife, then with a bottle. In substance, the Moores testified that Allen was visiting Mr. Moore at Moore's house in the early morning on Deecmber 30, 1973. Mrs. Allen and Mrs. Moore arrived there at approximately 3 a.m. An argument broke out between the Allens, and when Allen asked his wife where she had been, she became hysterical, grabbed a steak knife, and attacked her husband with it. Mr. Moore wrested the knife away from her. She then tried to hit Allen with a wine bottle. Once again Mr. Moore intervened, and took the bottle away. At this point Mrs. Allen threatened her husband, stating that she wished to see him dead.

Testimony was introduced showing that Mrs. Allen and Mrs. Moore had been out with two men (King and Lemons) on the evening of December 29, 1973. There is also some testimony that the two men told Mrs. Allen that if she desired, they would have Allen killed.

II

Petitioner contends that the prosecutor's questions on cross-examination and his corresponding comments in closing argument impermissibly referred to petitioner's exercise of his Fifth Amendment right to remain silent. In support of his argument, petitioner relies chiefly on *United States* v. *Hale,* 422 U.S. 171 (1975), and *Doyle* v. *Ohio,* 426

U.S. 610 (1976). Respondent attempts to distinguish these cases and contends that the prosecutor's questions and comments were not improper comments on petitioner's silence, but, rather, were used to impeach petitioner's statements about his state of mind. Specifically, respondent argues that the prosecutor attempted to impeach Allen's claim that he shot his wife because at the time he was "scared to death" of her, and thereby show that Allen's claim of self-defense was actually a recent fabrication.

United States v. *Hale*, 422 U.S. 171 (1975), is factually similar to the case at bar. Hale was tried and convicted of robbery. During cross-examination at trial, the prosecutor asked Hale why he had not given the police his alibi when he was questioned shortly after his arrest. The Supreme Court held that Hale's silence during police interrogation lacked significant probative value, and that any reference to his silence under such circumstances carried with it an intolerably prejudicial impact, thereby entitling Hale to a new trial. *Hale* was decided in the exercise of the Supreme Court's supervisory powers over lower federal courts. The court therefore did not reach the constitutional question involved.

The Supreme Court did subsequently reach the constitutional issue in *Doyle* v. *Ohio*, 426 U.S. 610 (1976). The specific question presented in *Doyle* was whether a state prosecutor may attempt to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings at the time of arrest. The Supreme Court held that it would be fundamentally unfair and a deprivation of due process to allow the arrested person's post-arrest silence to be used to impeach an explanation subsequently offered at trial. The court did, however, leave open the question of whether the use of a defendant's silence in this manner could, in some instance, constitute harmless error.

Respondent attempts to distinguish both *Hale* and *Doyle* by the fact that each of these cases involved cross-examination about the defendant's silence after the time of arrest and after each had received *Miranda* warnings. In the present case, however, according to respondent, Allen voluntarily made incriminating statements to the police prior to arrest or any *Miranda* warnings. These "volunteered statements" consisted of Allen's statement to Officer Melloy, "I shot my wife," as well as the statements about the gun being on the table inside, and about his wife being hurt "pretty bad."

The prosecution argued to the jury that these statements were inconsistent with Allen's claim at trial that he was "scared to death" because he thought his wife had a gun or knife in her purse. Thus, respondent argues that having opened the door to the question of his state of mind, petitioner cannot prevent the prosecutor from trying to impeach petitioner's credibility by cross-examining him about the inconsistency between his pre-trial and trial statements.

Respondent's argument must be rejected. It is apparent that the prosecutor did not attempt to impeach Allen with what he *told* the police officer. Instead, he impeached Allen with what he *did not tell* the officer. The prosecutor's questions on cross-examination were clearly designed to emphasize Allen's failure to tell police that he acted in self-defense. (See quotation, *supra*.) Moreover, petitioner's statement that "I shot my wife" is not inconsistent with a claim of self-defense. Nor are the statements that the gun

"A basic rule of evidence provides that prior inconsistent statements may be used to impeach the credibility of a witness. As a preliminary matter, however, the court must be persuaded that the statements are indeed inconsistent. 3A J. Wigmore, Evidence § 1040 (J. Chadbourn rev. 1970) . . . . If the Government fails to establish a threshold inconsistency between silence at the police station and later exculpatory testimony at trial, proof of silence lacks any significant probative value and must therefore be excluded.

"In most circumstances silence is so ambiguous that it is of little probative force."

• • • • •

"Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest." 422 U.S. 171 at 176, 180.

Allen's silence, alone, certainly was not inconsistent with his claim of self-defense at trial. His silence, even when coupled with the admission that he killed his wife, is still reasonably consistent with his defense at trial. Silence at the time of arrest may be inherently ambiguous, even apart from the effect of *Miranda* warnings, for in a given case there may be several explanations for silence that are consistent with the existence of an exculpatory explanation. *Doyle* v. *Ohio,* 426 U.S. 610 (1976) at 617-618, n. 8, citing *United States* v. *Hale,* 422 U.S. 171 (1975) at 177. When coupled with *Miranda* warnings, every post-arrest silence is insolubly ambiguous, because the arrestee's silence may

is lying on a table inside or that petitioner's wife was pretty badly hurt inconsistent with petitioner's theory. The inconsistency, if there is one, is in what Allen failed to say.

Essentially, respondent argues that because Allen admitted to the police that he shot his wife, his failure to include in his statement his reason for the shooting was an omission that could be used for impeachment. Had Allen remained completely silent, there is no question but that the prosecution would have been prohibited from using his silence to impeach his testimony that he acted in self-defense. But a person under arrest does not have to refrain from saying anything in order to preserve his Fifth Amendment rights. It is his privilege to stop at any time during custodial interrogation to assert his rights. *People* v. *Robinson,* 44 Ill. App. 3d 447, 358 N.E. 2d 43, 45 (1976). By telling Officer Melloy that he shot his wife, Allen was merely stating the obvious, and he may not be held to have waived or forfeited his Fifth Amendment rights by this admission.

The prosecutor's questions relating to Allen's silence were not limited to Allen's failure to claim self-defense either before, at the time of, or after his "volunteered" statements to police. Rather, the questions were framed broadly (e.g., "In fact, you never told any law enforcement officer this [that you were in fear of your life] did you?" . . . "In fact, the first statements regarding this are from the stand in this trial aren't they?") so as to elicit a response concerning petitioner's failure to claim self-defense, both before and after he had been formally arrested and advised of his constitutional right to remain silent.

Thus, in the present case, just as in *Hale,* the petitioner was forced to admit on cross-examination that he had not offered exculpatory information to police at the time of his arrest. As the Supreme Court said in *Hale*:

be nothing more than his exercise of the right to remain silent. *Doyle* v. *Ohio,* 426 U.S. 610 at 617. Therefore, Allen's silence can as easily be interpreted as indicating reliance on his right to remain silent as to give rise to the inference that the explanatory testimony was an interim fabrication.

The court rejects respondent's argument that the present case is distinguishable from *Hale* and *Doyle* in that Allen's silence is not a post-arrest silence, nor a silence occurring after *Miranda* warnings. As previously noted, the prosecutor's questions were not limited to Allen's pre-arrest silence or silence prior to the reading of *Miranda's* warnings, and thereby impermissibly referred to Allen's silence after the *Miranda* warnings were given. Apart from this fact, however, the prosecutor's questions and comments relating to Allen's silence prior to *Miranda* warnings were also improper.

The distinction between silence occurring prior to and silence occurring after *Miranda* warnings was rejected in *United States* v. *Impson,* 531 F. 2d 274 (5th Cir. 1976). In *Impson,* the Court of Appeals for the Fifth Circuit noted that:

> "The contention is that practically *Miranda* warnings tend to inhibit speech and that silence after such warnings is less inconsistent with innocence than silence in the absence of such warnings. This argument conflicts with the whole purpose and policy of *Miranda* by rewarding the police for failure to inform an accused person promptly upon his arrest of his right to remain silent. Silence is the right of the innocent as well as of the guilty, *Helton* v. *United States,* Note 3, *supra.* [221 F. 2d 338, 341-342 (5th Cir., 1955)]. In the face of the numerous legitimate reasons for an arrested person to elect to remain silent we decline to attempt an enumeration of instances in which silence by an arrested person

> may be of probative value to the government's case. We discern no merit in the appellee's argument that silence in the absence of *Miranda* warnings raises a greater inference of guilt than silence following such warnings." [footnote 3 omitted] (531 F. 2d 274 at 277)

The Fifth Circuit reaffirmed this principle in the recent case of *United States* v. *Henderson,* 565 F. 2d 900 (5th Cir. 1978), a case involving prosecutorial questioning and comment about a defendant's silence occurring prior to arrest and prior to any *Miranda* admonitions. The principles and rationale set forth in *Impson* and *Henderson, supra,* are applicable with equal force to the present case. Therefore, the prosecutor's questions and comments about Allen's silence, occurring before arrest or any *Miranda* admonitions, were also improper. *United States* v. *Impson,* 531 F. 2d 274 (5th Cir. 1976); *United States* v. *Henderson,* 565 F. 2d 900 (5th Cir. 1978).

The court deems *Doyle* v. *Ohio,* 426 U.S. 610 (1976), to be controlling here.

III

Respondent argues that even if the prosecutor's questions and comments were constitutionally impermissible, any error which resulted was harmless. The Supreme Court in *Doyle* v. *Ohio,* 426 U.S. 610 (1976) at 619-620, specifically left open the question as to whether prosecutorial comment on a defendant's silence might be harmless error. The language used in *Doyle* strongly suggests that the Supreme Court might have employed the harmless error standard in that case, had the argument been asserted. *See* 426 U.S. 610 at 619-620. To date, two circuits have applied the harmless error doctrine to cases falling under *Doyle. See Chapman* v. *United States,* 547 F. 2d 1240 (5th Cir. 1977), *cert. denied,*

431 U.S. 908 (1977); *Meeks* v. *Havener,* 516 F. 2d 902 (6th Cir. 1975) (per curiam), *vacated and remanded,* 428 U.S. 908 (1976), *on remand,* 545 F. 2d 9 (6th Cir. 1976).

It is well settled that before a federal constitutional error can be held to be harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U.S. 18 (1967) at 24. Thus, the question becomes whether there is a reasonable possibility that the error complained of might have contributed to the conviction. *Fahy* v. *Connecticut,* 375 U.S. 85 (1963) at 86-87. In making this determination, it is immaterial that there was sufficient evidence which the petitioner could have been convicted without the evidence complained of. 375 U.S. 85 at 86.

In each of the cases in which a *Doyle* violation was held to constitute harmless error, the prosecutor asked only one question eliciting the fact of the defendant's silence. Neither in cross-examination nor in closing argument did the prosecutor suggest that silence impeached the defendant's trial testimony. In the present case, by contrast, the prosecutor asked a short series of questions on cross-examination relating to Allen's silence. The questions were designed specifically to elicit this fact and, because of it, to lead the jury to infer that Allen's claim of self-defense was merely a recent fabrication. In both cross-examination and closing argument, the prosecutor suggested that the petitioner's silence impeached his claim of self-defense.

Although there is certainly sufficient evidence in the record to support petitioner's conviction, petitioner's self-defense claim cannot be said to be transparently frivolous. This is particularly true in light of his wife's prior knife attack on him several days earlier and the evidence regarding

prior death threats. In explaining the use of the harmless error rule in cases in which a *Doyle* violation is involved, the Fifth Circuit Court of Appeals stated that:

> "When the prosecution uses defendant's post-arrest silence to impeach an exculpatory story offered by defendant at trial and the prosecution directly links the implausibility of the exculpatory story to the defendant's ostensibly inconsistent act of remaining silent, reversible error results even if the story is transparently frivolous." *Chapman* v. *United States,* 547 F. 2d 1250 (5th Cir. 1977) at 1249, *cert. denied,* 431 U.S. 908 (1977).

The jurors in Allen's trial may have been persuaded by the improper cross-examination and argument to conclude that if Allen had reasonably believed his life was in danger and that his wife was reaching for a weapon, he would have told this to the police. Therefore, the court cannot conclude that the error was harmless beyond a reasonable doubt, *Chapman* v. *California,* 386 U.S. 18 (1967), and Allen is entitled to a new trial.

Accordingly, IT IS ORDERED that petitioner's motion for summary judgment is ALLOWED, the judgment of conviction is VACATED, and the case is REMANDED to the Circuit Court of Peoria County, to allow the State of Illinois a period of 90 days from the date of this order to afford Allen a new trial, failing which Allen is entitled to his release.

IT IS FURTHER ORDERED that respondent's motion to dismiss is DENIED.

Entered July 24, 1978

/s/ Robert D. Morgan
United States District Judge

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit